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NO. 88-176

Supreme Court, U.S.

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JOSEPH F. SPANIOL, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF MISSOURI,
Petitioner,

vs.

KENNETH PRESLEY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

OFFICE OF THE PUBLIC DEFENDER
31ST JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Kenneth Presley, the Respondent, was charged in CR583-807FX4 in Greene County, Missouri with the offenses of second degree sexual abuse, child abuse, sexual abuse in the first degree, and four counts of rape. The victims were his stepdaughters Lisa and Melody Ince. He was found guilty at trial and thereafter sentenced according to the jury verdict. He received one year in the county jail for sexual abuse in the second degree, five years for abuse of a child, three years for sexual abuse in the first degree, and twelve years for each rape. The Court ran the sentences consecutively. Mr. Presley appealed the convictions and they were affirmed in State of Missouri v. Presley, 694 S.W.2d 867 (Mo. App. S.D. 1985).

Mr. Presley filed a Motion to Vacate, Set Aside or Correct a Conviction under Missouri Supreme Court Rule 27.26 (App. at A2). A hearing was held on that motion and the Honorable Don Bonacker, Division III of the Greene County, Missouri Circuit Court sustained Mr. Presley's motion finding he was denied effective assistance of counsel. (His ruling and all the subsequent decisions on appeal can be found in the appendix to Petitioner's Petition.)

The Missouri Court of Appeals, Southern District, en banc, affirmed Judge Bonacker's ruling. The State of Missouri asked for rehearing in the Court of Appeals and was denied. The State of Missouri asked the Missouri Supreme Court to take the case on transfer and the request was denied. The State of Missouri asks this Court to grant a writ of certiorari to hear this case.

Mr. Presley objects to this Court granting the State's petition for writ of certiorari.

ARGUMENT

Mr. Presley was charged with first degree sexual abuse, second degree sexual abuse, abuse of a child, and rape. During the voir dire Juror Frances Cates spoke up when the panel was asked if anyone had been a victim of a crime. He said that he had been burglarized at his home seven years before but the articles had been returned. He also said his businesses had been broken into several times. There had also been an armed robbery. Further, his daughter was "exposed by an exhibitionist" three years before (Petitioner's Appendix A69-70). When asked if the burglaries or his daughter's experience would make him unable to judge the defendant fairly, he said, "I think I'd be a little partial to your client, or against your client." He was asked: "You'd be partial to the State?" He adopted the attorney's statement by saying, "Right." (Petitioner's Appendix A70.)

Mr. Cates gave four different events which supported his reason why he would be partial to the State. It is typical of a juror speaking in front of a crowd of potential jurors, in front of a court, and in front of a defendant, to qualify his or her statements by softening them. He said he was a "little partial." What should be understood here was that the juror was a juror for the State. He could not give Mr. Presley a fair and impartial trial. Therefore even before the evidence began Mr. Presley had only eleven jurors listening to his case.

Petitioner argues the prejudice prong of the Strickland test (Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 80 L.Ed.2d 674 (1984)), in that prejudice to Mr. Presley was wrongly

presumed and the motion court and appellate court did not find actual prejudice. Petitioner asks for review because the appellate court did not follow Strickland and that the Court of Appeals' decision was contrary to the rulings of two federal courts and the decisions in several state courts. Petitioner is wrong.

A. Strickland v. Washington

This Court requires that in reversing for ineffective assistance of counsel a defendant must show that: a) counsel's performance was deficient, and b) this deficient performance prejudiced the defense. The Court of Appeals, Southern District, without specifically holding, found the trial counsel's performance to be deficient. It then found that Mr. Presley was prejudiced by the ineffective assistance of counsel in not striking Juror Cates.

The Missouri appellate court specifically found this situation was one envisioned by the Strickland court where prejudice is presumed (Petitioner's Appendix A15). The Strickland court mentioned several situations in which prejudice may be presumed: actual or constructive denial of the assistance of counsel; state interference with counsel's assistance; and counsel's conflict of interest. Strickland then refers to U.S. v. Cronic, 466 U.S. 660, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), which lists even more scenarios: complete denial of counsel; or when "counsel fails to subject the prosecution's case to meaningful adversarial testing," Cronic, 466 at 659. Further:

Circumstances of that magnitude may be present on some occasions when although counsel is available

to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Id. at 659-660. The Cronic court also adds that the accused must show how "specific errors of counsel undermined the reliability of the finding of guilty." Id. at 659, n.26.

The Strickland court offers examples of presumed prejudice. The Cronic court offers different examples of presumed prejudice. Obviously, neither decision intended its list to be exclusive. Nor did this Court intend to bind all inferior Courts to this Court's list of what can be presumed prejudicial and what cannot. Prejudice depends on the error being considered, the circumstances, the evidence, and the legal precedent of the respective jurisdictions.

Missouri has a strong tradition of ensuring a fair and impartial jury. The Presley appellate court repeated that a defendant has a constitutional right to twelve impartial jurors, not just eleven. (Petitioner's Appendix A14.) The Missouri Supreme Court has reiterated over and over:

An accused must be afforded a full panel of qualified jurors before he is required to expend his peremptory challenges; denial by a trial court of a legitimate request by an accused to excuse for cause a partial or prejudiced venireperson constitutes reversible error.

State v. Stewart, 692 S.W.2d 295, 298 (Mo. banc 1985).

This proposition rests now only in precedent but is rooted in the constitutionally guaranteed right of every accused to a "public" trial by an impartial jury," Mo. Const. Art. I, Sec. 18(a), and personifies a dedicated judicial effort to preserve inviolate this constitutionally guaranteed right in the broadest sense.

State v. Thompson, 541 S.W.2d 16, 17 (Mo. App. 1976).

Given the enormous solemnity in which Missouri courts regard the violation of Missouri (and federal) constitutional rights to an impartial jury, there is no wonder that the Court of Appeals decided that prejudice can be presumed.

Please note that a Missouri Court of Appeals decision allowing a reversal of a criminal conviction is a very unusual occurrence, especially in the Southern District. Petitioner is an alarmist when he predicts that the floodgates will open as a result of this opinion. All that the Court of Appeals said was this:

The instant record shows that the jury contained one juror who was, by his own admission, biased. That was tantamount to a denial of the right to trial by jury. It is no answer to say that the other 11 jurors were free of bias and all of them agreed upon a verdict of guilty. "A constitutional jury means twelve men as though that number had been specifically named; and it follows that, when reduced to eleven, it ceased to be such a jury quite as effectively as though the number had been reduced to a single person." Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 256, 74 L.Ed. 854 (1930).

The instant situation, this court holds, is an example of the type the Court envisioned by the language in Strickland: "in certain Sixth Amendment contexts, prejudice is presumed." There was here a denial of the right to trial by jury. This fits the Strickland language, at 104 S.Ct. 2067, that "prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost."

Presley v. State, slip opinion at 12 (emphasis added), (Petitioner's Appendix A14-15).

The Court's decision was limited to the facts of the case. To use Petitioner's language, "when boiled to its essence," the decision held this: when a juror announces he is biased toward the State, and all parties recognize that he has that bias, and there was absolutely no strategic reason for defense counsel to leave that juror on the jury, and when all the evidence shows that the juror was left on the jury by counsel's mistake, and when that mistake violates an accused's fundamental state and federal constitutional rights, then a court may find that an accused was denied the right to trial by jury.

That is all the decision says. There are no flood gates which will open as a result of this opinion.

The policy implications of this decision are minimal. In fact, so minimal that there is no reason for this Court to consider this case any further. Under Rule 17 of the U.S. Supreme Court, a writ of certiorari will be granted only when there are "special and important reasons therefor." This Court will grant a writ of certiorari when "a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court." Rule 17(1)(c).

This Court, in Strickland, has already decided the question of what constitutes ineffective assistance of counsel under the Sixth Amendment to the United States Constitution.

This Court will grant a writ of certiorari when the state court "has decided a federal question in a way in conflict with applicable decisions of this Court." Rule 17(1)(c). Again, the Court of Appeals referred constantly to Strickland for its authority and made its decision in conformity with Strickland. It did not show actual prejudice because Strickland allows prejudice to be presumed. That prejudice, according to Missouri law and federal constitutional law, could be and was presumed. Therefore, the decision in Presley by the Missouri Court of Appeals was in keeping with the Strickland decision.

OTHER JURISDICTIONS

An alternative consideration for granting certiorari is whether the state court decided a federal question in a way which conflicts with a decision of another state court of last resort or of a federal court of appeals. Rule 17(1)(b). Petitioner argues that the Court of Appeals' opinion is against the great weight of authority in state and federal courts which have used the Strickland standard. Petitioner lists these cases (Petitioner's Brief at 12). However, in reviewing all the cases cited by Petitioner, none of the cases cited are in conflict with the appellate court's decision, one is in agreement, none are factually similar, and some were even decided before Strickland was published and therefore didn't rely on any standard whatsoever. The following are the cases cited by Petitioner and discussion regarding their nonrelevancy:

U.S. v. Taylor, 832 F.2d 1187 (10th Cir. 1987).

Factually dissimilar from Presley. Counsel used only eight or nine of his peremptory challenges and waived the rest. There was no allegation of inability to be impartial by any juror. There was no discussion of presumed versus actual prejudice.

Edgemon v. Lockhart, 768 F.2d 252 (8th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1468 (1986). Defense counsel didn't strike a certain juror because the juror was an acquaintance of defense counsel and, even though the juror knew his cousin would testify, he knew he could be impartial. It was not a mistake by defense counsel to keep the juror. It was his tactical decision. Unlike Presley where the juror was left on by mistake.

Mason v. State, 789 Ark. 299, 712 S.W.2d 275 (Ark. 1986). The Supreme Court of Arkansas reversed a conviction after determining that the accused was denied effective assistance of counsel when, among other things, it found under the Strickland test that the accused was prejudiced by trial counsel not giving the accused a jury list. If he had been present during voir dire he could have told trial counsel that two of the jurors were partial toward the state, one because she heard rumors about the case, and the other because she was a victim of a burglary. Trial counsel did not ask the panel during voir dire about being the victim of a crime. The Arkansas Supreme Court did not even discuss proof of actual prejudice; they said they did not

think of any trial strategy which would have permitted these attorney errors; and they presumed prejudice. This opinion is in conformity with the Missouri Court of Appeals opinion.

Trenor v. State, 252 Ga. 264, 313 S.E.2d 482 (Ga. 1984). This case was decided before Strickland. The Court used a different standard than that used in Strickland. The Court found no ineffective assistance of counsel when the trial lawyer did not ask the court to wake up a juror during closing argument.

People v. Collins, 106 Ill.2d 237, 478 N.E.2d 267 (Ill. 1985). The court found that the attorney's reason for keeping a juror who said she could be impartial was reasonable. The attorney's action therefore didn't even meet the first prong of the Strickland test.

Turner v. State, 508 N.E.2d 541 (Ind. 1987). The juror whom the accused said should have been struck had a DWI conviction but never said he would be partial to the state. No Strickland discussion at all.

State v. Nebinger, 412 N.W.2d 180 (Iowa Ct. App. 1987). The facts are completely different here from that in Mr. Presley's case and there was no discussion of prejudice.

People v. Robinson, 154 Mich. App. 92, 397 N.W.2d 229 (Mich. Ct. App. 1986). All jurors said they could be impartial. This case is different from Mr. Presley's and has no relevant discussion of what a showing of prejudice must be.

State v. Price, 104 N.M. 703, 726 P.2d 857 (N.M. Ct. App. 1986). Ineffective assistance of counsel was not found because, unlike Mr. Presley's case, trial counsel did everything he could to correct the error and protect the accused's rights.

Perkins v. State, 695 P.2d 1364 (Okla. Crim. App. 1985). Not on point. The juror misunderstood counsel's question. There is no discussion of how to demonstrate prejudice or of Strickland itself.

Commonwealth v. Mancini, 340 Pa. Super. 492, 490 A.2d 1377 (Pa. Super. Ct. 1985). The Court said the accused agreed with defense counsel's decision not to strike a juror. There was no discussion of prejudice and the court used different standards than Strickland's in determining ineffective assistance of counsel.

Parker v. State, 693 S.W.2d 640 (Tex. Crim. App. 1985). A juror thought that the accused may be hiding something if he didn't testify. Defense counsel did not strike her. The appellate court suggested that defense counsel could have had a strategic reason for not striking that juror. The Court, however, was obviously agonized by the fact that there was no evidentiary hearing to determine what counsel's reasons were for not striking the venirewoman. Twice in its opinion the court asked for evidentiary hearings so it did not have to decide these issues in the dark. Unlike this decision, a hearing was held in Presley and the trial attorney had no strategic reason for not striking Juror Cates.

Finally, in Gordon v. State, 469 So.2d 795 (Fla. Ct. App. 1985) the Court wrote:

At the time of jury selection, one juror stated she had heard of this particular case, had discussed it with friends and was biased. She further indicated that she had a prejudice against the defense counsel which would affect her decision. The trial judge offered to remove the juror for cause if requested. Defense counsel permitted her to sit as a juror.

Id. at 797.

The conviction in Gordon was reversed for several attorney errors. A discussion of actual versus presumed prejudice was done given by the Gordon court. That very fact demonstrates the correctness of the Court of Appeals decision in Presley. The gross violation of an accused's constitutional right to trial by a fair and impartial jury needs no discussion. It is presumed prejudicial, by the Gordon court, by the Mason court, and by the Presley court.

As can be seen, the Court of Appeals' opinion is not in conflict with any opinion or with any jurisdiction in spite of what Petitioner alleges. Indeed it can be read in conformity with all the above cited decisions and is, indeed, supported by them. Therefore, under Rule 17(a)(b) of this Court, there is no conflict to be resolved.

C. Prejudice

Finally, this Court is not being asked to find that prejudice did actually exist. That is not the question before this Court. Petitioner raises the issue anyway.

Juror Cates did not answer when the panel was asked if everyone could be fair and impartial considering the "nature

of this case" (Petitioner's Appendix A69) (emphasis added). This was a case involving sexual abuse and rape of stepdaughters. Clearly the court and attorneys were asking a specific question as to whether a case involving the sexual abuse of children would cause the panel not to be fair and impartial. But that was not Cates' problem. It was because of the prior burglaries and the exposure to his daughter that he could not be impartial. Cates did all that he could do to show the Court he could not be fair by announcing his feelings at the appropriate time. Instructing a juror to be fair and impartial will not cure his or her prejudice. If that were true then there would be no reason for voir dire at all.

Secondly, Petitioner suggests that the evidence was strong enough to have convicted Mr. Presley without Juror Cates. Petitioner notes that Mr. Presley did not challenge the weight of the evidence against him in his post-conviction hearing. Petitioner fails to note that Missouri's post-conviction relief procedure, under Rule 27.26 (Appendix at A2), does not allow for challenging the trial evidence and, in fact, is very narrow in scope.

The primary evidence by the state at trial was given by the two stepdaughters. There was no medical evidence confirming rape. There was no confession by Mr. Presley. Mr. Presley testified at trial and asserted his innocence. The defense called fourteen witnesses other than Mr. Presley. Juries have, under similar evidence in similar

cases, acquitted the accused. They could have done so in this case. Because they did not acquit does not mean that any jury anywhere would have found him guilty. It's wrong to say that just because the weight of the evidence is against the accused he is not entitled to a fair and impartial jury. Further, the weight of the evidence could not be as strong as Petitioner alleges because both Ince girls have recanted their story. And even further, the jury assessed minimal sentences for each of the charges. Mr. Presley could have gotten life on each rape charge instead of 12 years, 5 years for sexual abuse in the first degree instead of 3 years, and 7 years for abuse of a child instead of 5 years.

The "right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 1449 n.14, 25 L.Ed.2d 763 (1970). The right to a fair and impartial jury is inviolate under the Sixth Amendment to the United States Constitution and Article 1, Section 18(a) of the Missouri Constitution. The findings of fact and conclusions of law of the trial court are guaranteed the presumption of correctness. State v. Harvey, 692 S.W.2d 290, 293 (Mo. banc 1985). The trial court and the appellate court both correctly decided this case under federal and state law and federal and state decisions.

CONCLUSION

In view of the foregoing, Mr. Presley, Respondent, respectfully requests that Petitioner's petition for writ of certiorari be denied.

Respectfully submitted,



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APPENDIX

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) when a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

MISSOURI SUPREME COURT RULE 27.26

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this state or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside, or correct the same. The following procedure shall be applicable to motions filed pursuant to this Rule:

(a) **Nature of Remedy.** This Rule is intended to provide the exclusive procedure which shall be followed when a prisoner in custody seeks relief on the basis of any of the attacks on a sentence enumerated above. The motion seeking such relief shall be filed in the court where the sentence was imposed. This Rule does not suspend the rights available by habeas corpus but rather prescribes the procedure to be followed in seeking the enforcement of those rights. It includes all relief heretofore available in any court by habeas corpus when used for the purpose of seeking to vacate, set aside or correct a sentence, plus relief not available by habeas corpus. A motion filed hereunder is an independent civil action which should be separately docketed. The action which should be separately docketed. The procedure before the trial court and on appeal is governed by the Rules of Civil Procedure insofar as applicable. No cost deposit shall be required.

(b) **When Remedy May be Invoked.**

(1) The provisions of this Rule may be invoked only by one in custody claiming the right to have a sentence vacated, set aside or corrected.

(2) A motion to vacate, set aside, or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which an appeal may be perfected.

(3) A proceeding under this Rule ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal.

(c) **Form and Sufficiency of Motion.** A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto. The motion shall include every ground known to the prisoner for vacating, setting aside, or correcting his conviction and sentence. The prisoner shall

verify the correctness of the motion, including the fact that he has recited all claims known to him.

(d) **Successive Motions.** The sentencing court shall not entertain a second or successive motion for relief on behalf of the prisoner where the ground presented in the subsequent application was raised and determined adversely to the applicant on the prior application or where the ground presented is new but could have been raised in the prior motion pursuant to the provisions of subsection (c) of this Rule. The burden shall be on the prisoner to establish that any new ground raised in a second motion could not have been raised by him in the prior motion.

(e) **Hearing.** As soon as a motion hereunder is received by the circuit clerk, he shall notify the prosecuting attorney and transmit a copy thereof to him. If appointment of counsel is required under (h) of this Rule, such counsel shall be appointed immediately and a copy of the motion transmitted to him. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing thereon shall be held. "Prompt" means as soon as reasonably possible considering other urgent business of the court. This hearing shall be an evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of records of the court, that issue shall be determined in the evidentiary hearing. All proceedings on the motion shall be recorded by the official court reporter.

(f) **Burden of Proof.** The prisoner has the burden of establishing his grounds for relief by a preponderance of the evidence.

(g) **Presence of Prisoner.** The prisoner shall be produced at any evidentiary hearing on a motion attacking a sentence where there are substantial issues of fact.

(h) **Right to Counsel.** When an indigent prisoner files a pro se motion, the court shall immediately appoint counsel to represent the prisoner. Counsel shall be given a reasonable time to confer with the prisoner and to amend the motions filed hereunder if desired. Counsel shall have the duty to ascertain from the prisoner the facts supporting the grounds asserted in the motion and if those facts are not sufficiently stated in the motion, counsel shall file an amended motion. Counsel also shall ascertain from the prisoner whether he has included all grounds known to him as a basis for attacking the judgment and sentence and, if not, shall file an amended motion which also sufficiently alleges any additional grounds and the facts in support thereof. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel to represent the indigent defendant.

(i) Judgment. The court shall make findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgement was rendered without jurisdiction, or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentences as may appear appropriate.

(j) Appeal. An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the prisoner or by the state. An appeal may be taken from the order entered on the motion as in a civil case as authorized by Section 512.020, RSMo. Appellate review shall be limited to a determination of whether the findings, conclusions, and judgment of the trial court are clearly erroneous.

(k) Costs. If the trial court finds that a prisoner desiring to appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost the transcript of such proceeding for appellate review. The trial court, when the appeal is taken, shall order the official court reporter to prepare the transcript promptly. If the trial court finds adversely to a prisoner on the issue of indigency, it shall certify and transmit to the appellate court a transcript of the evidence on that issue only so as to permit review of that issue by the appellate court.

(l) Counsel on Appeal. If a prisoner desires to appeal and contends he is without means to employ counsel to perfect the appeal, the trial court, if satisfied that the prisoner is an indigent person, shall appoint competent counsel to conduct such appeal. Such counsel, may, in the discretion of the court, be the same counsel who represented the prisoner in the trial court on said motion. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.